INDEX.

		Page
I.	Opinions of Courts Below	1
II.	Jurisdiction	1
III.	Specification of Errors	2
IV.	Statement of the Case	3
V.	Argument	5

A.

1. The petitioner was unconstitutionally deprived of his right to a jury trial in the State Court — 8
2. The proceedings in the District Court giving rise to the controversy were illegally collusive — 13
3. That the conveyance assailed in the controversy was fraudulent under the Uniform Fraudulent Conveyance Act of Pennsylvania and under 13 Elizabeth in force in that State — 19
4. That the Receivers' possession is not a legal obstacle to prevent attack upon the alleged fraudulent character of the transaction by customary procedural instruments employed in practice in the State where the transaction is assailed — 25
5. That a solvent debtor as to any of his creditors cannot create an illegal preference — 28

B.

1. Is it the duty of a judge in a Federal Court of the first instance in determining a matter falling within its jurisdiction to place upon the record by some method the reasons for his decision? — 35
2. By what methods of procedure are issues of fact in the Eastern District of Pennsylvania arising upon motions in equity proceedings to be determined? — 37
3. Can the personal attributes of counsel promoting a given legal situation in any manner effect the legality thereof? — 40
4. Does the present record disclose the action of counsel involved to be either able or honest as tested by acceptable standards? — 40
5. Can posterior judicial action between strangers involving one of several legal issues be judicial justification for anterior judicial action between different parties based upon the other legal issues? — 43
6. Does the transaction disclosed upon the Record violate the Pennsylvania Sales in Bulk Law? — 46

CASES CITED.

	Page
Adams v. Jones, 11 Fed. 2nd 759	10
American Candy Mfg. Co. In re 256 Fed. 87	22-26
American Trust Co. v. Kaufman, 276 Pa. 41	11-26
Anderson v. Gray, 284 Fed. 773	11
Atlas, The, 93 U. S. 316	12
Atlas Portland Cement Co. v. Brick Co., 280 Pa. 449	11-24-25
Baylis v. Travellers' Ins. Co., 113 U. S. 321	12
Blair v. Rwy. Co., 20 Fed. 348	42
Blennerhasset v. Sherman, 105 U. S. 117	32-33
Bonk In re. 268 Fed. 1015	21
Brashear v. West, 7 Pet. 608	17-32
Brooks v. Marbury, 11 Wheat. 78	32
Building Asso. v. Elleford, 258 Pa. 144	11
Clarke v. White, 12 Pet. 178	32
Clarke v. Clarke, 178 U. S. 191	17
Cole v. Cunningham, 133 U. S. 107	17
Commercen, The, 1 Wheat. 382	27
Coyle v. Coal Co., 289 Fed. 435	21
Crawford v. Neal, 144 U. S. 595	32
Cummings v. Missouri, 4 Wall. 325	27
Decorative Stone Co. v. Trades Council, 13 Fed. 2nd 123	39
Delphia Mills v. Richards, 62 Pa. S. C. 9	11-24-25
Edwards v. Kearzey, 96 U. S. 601	27
Empire Fixture Co. v. Practical Fixture Co., 20 Fed. 2nd 295	23
Evans v. Stettnisch, 149 U. S. 607	41
First Nat. Bank v. Parks, 94 Pa. S. C. 570	11
First Nat. Bank v. Raleigh Savings Bank, 37 Fed. 2nd 301	46-49
Fosdick v. Schall, 99 U. S. 251	26
Frances Investment Co. v. Thomason, 11 Fed. 2nd 229	39
Galbraith v. Rutter, 20 Pa. S. C. 556	17
Gooch v. Haworth, 3 Beav. 428	7-25
Grant v. Ins. Co., 106 U. S. 429	26
Hawkins v. Barney, 5 Pet. 466	33
Hennon v. McClane, 88 Pa. 219	22
Hogsett v. Thompson, 258 Pa. 85	13
Hooper-Mankin Fuel Co. v. Rwy. Co., 20 Fed. 2nd 500	12
Huff v. Hutchinson, 14 How. 588	18
Huntley v. Kingman, 152 U. S. 527	32
Illinois Car Co. v. Linstroth Wagon Co., 112 Fed. 740	21
Irwin v. Hess, 12 Pa. S. C. 163	11
Issenhuth v. Kirkpatrick, 258 Fed. 293	10
Jones v. Casualty Co., 255 Pa. 573	21
Langdon v. Branch, 37 Fed. 463	28
Lathrop v. Drake, 91 U. S. 520	19
Lehigh Mining Co. v. Kelly, 160 U. S. 327	14
Link Belt Machinery Co. v. Hughes, 195 Ill. 413	25

	Page
Lloyd v. Fulton, 91 U. S. 485	11
Locust Building Co. In re. 299 Fed. 764	11
Louisiana v. New Orleans, 102 U. S. 207	23
Love v. Clayton, 287 Pa. 215	32
Lupton v. Janney, 13 Pet. 386	33
Lutcher & Moore Co. v. Knight, 217 U. S. 257	34
McCartney v. Kipp, 171 Pa. 647	21
McLean v. Miller Robinson Co., 55 Fed. 2nd 232	46
Macallen v. Massachusetts, 279 U. S. 629	28
Magee v. Ins. Co., 92 U. S. 93	33
Magniac v. Thompson, 7 Pet. 348	32
Manhattan Trust Co. v. Seattle Coal Co., 16 Wash. 499	25
May v. Tenney, 148 U. S. 60	32
Metcalf v. Moses, 161 N. Y. 587	25
Michaels v. Post, 21 Wall. 426	16
Miller & Lux v. East Side Canal Co., 211 U. S. 293	14
Michigan v. Michigan Trust Co. (unreported)	27
Montgomery Web Co. v. Dienelt, 133 Pa. 585	11-24-25
Monmouth Investment Co. v. Means, 151 Fed. 163	48
New York v. Pine, 185 U. S. 93	33
No. Pac. Rwy Co. v. Boyd, 177 Fed. 804	16
No. Pac. S. S. Co. v. Soley, 257 U. S. 221	15
Norton v. Switzer, 93 U. S. 356	12
Olcott v. Bynum, 17 Wall. 44	11
Page v. Patton, 5 Pet. 315	47
Pennsylvania College Cases, 13 Wall. 215	48
Pollock v. Trust Co., 157 U. S. 650	44
Pusey & Jones Co. v. Hanssen, 261 U. S. 491	49
R. R. Comm. v. Maxcy, 281 U. S. 82	36
Ricard v. Williams, 7 Wheat. 116	33
Richardson's Est. In re 294 Fed. 349	13
Russell v. East Anglian Rwy. Co., 3 MacN. & G. 125	7-25
Schimmel v. Cohen, 275 Pa. 121	32
Schloss v. Schloss, 14 App. Div. 333 (N. Y.)	25
Scott v. Neely, 140 U. S. 106	10
Simons Ex parte, 247 U. S. 231	10
Skinner & Eddy Corp. Ex parte, 265 U. S. 96	10
Smith v. Keener, 270 Pa. 582	32
So. Dakota v. No. Carolina, 192 U. S. 320	18
Southern Realty Co. v. Walker, 211 U. S. 603	14
Story Parchment Co. v. Paterson Paper Co., 282 U. S. 567	3-5-34
Suydam v. Williamson, 20 How. 432	41
Sweeny v. Hunter, 145 Pa. 373	17
Tompkins v. Wheeler, 16 Pet. 116	32
Twist v. Prairie Oil Co., 274 U. S. 689	12
U. S. v. Kinney, 264 Fed. 542	24
U. S. v. Rogers, 255 U. S. 168	3
U. S. v. Whited & Wheless, 246 U. S. 552	12
Vance v. Clay Mfg. Co., 82 Fed. 251	21

Page

Virginian Rwy. Co. v. U. S., 272 U. S. 675 36
Voorhees v. Bank of U. S., 10 Pet. 473 18
Wallis v. Shelly, 30 Fed. 747 12
Whitehead v. Shattuck, 138 U. S. 151 10
Wiswall v. Sampson, 14 How. 52 6-7
Zerbe v. Miller, 16 Pa. 488 21

STATUTES CITED.

28 U. S. C. A. sec. 347 (43 Stat. at Large 938 sec. 1) 1
11 U. S. C. A. sec. 48 (30 Stat. at Large 553 sec. 2) 1
Constitution U. S., 7th Amendment 9
Judicial Code sec. 37 (28 U. S. C. A. 80) 13
39 Purdon Pa. Digest secs. 354-355 20
(Act May 21, 1921 P. L. 1046 secs. 4-5)
11 U. S. C. A. sec. 96 (National Bankruptcy Act sec. 60 a) 29
11 U. S. C. A. sec. 21 (National Bankruptcy Act. sec. 3) 30

RULES OF COURT CITED.

E. Dist. Pa. Rule 8 sec. 2 37
Federal Equity Rule 47 38
Federal Equity Rule 46 38

TEXT BOOKS CITED.

Black Judgments sec. 293 2nd Ed. 16
Bouvier Law Dictionary, Vol. 3, p. 2662 3rd Ed. 31
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Cooley Constitutional Limitations, p. 597, 8th Ed. 27
Corpus Juris, Vol. 42, p. 506, sec. 130 39
Corpus Juris, Vol. 23, p. 106, sec. 1914 42
Corpus Juris, Vol. 15, p. 916, sec. 304 44
High Receivers, secs. 188-216, 4th Ed. 42
Remington Bankruptcy, sec. 1739, 3rd Ed. 30
Ruling Case Law, Vol. 20, p. 663, sec. 2 47

IN THE

Supreme Court of the United States

No. 40 **October Term, 1932**

BERNARD L. SHAPIRO, PETITIONER,

vs.

HORACE B. WILGUS AND DAVID BACHMAN, RECEIVERS OF MILLER ROBINSON COMPANY, RESPONDENTS.

PETITIONER'S BRIEF.

I.

THE OPINIONS OF THE COURTS BELOW.

a. The District Court of the United States for the Eastern District of Pennsylvania, in which this cause originated filed no opinion.

b. The Circuit Court of Appeals for the Third Circuit filed an opinion on December 31, 1931. Reported in 55 Fed. 2nd 234 (See post p. 46).

It is printed in the record at p. 23.

II.

JURISDICTION.

The jurisdiction of this Court is invoked pursuant to Sec. 240 of the Judicial Code as amended by 43 Stat. at Large, 938 Sec. 1 (February 13, 1925).

28 U. S. C. A., Sec. 347

and

30 Stat. at Large, 553 C. 541, Sec. 25 (July 1, 1898) and 43 Stat. at Large, 936, 941, C. 229, Sec. 1, Sec. 13, clause (C).

11 U. S. C. A., Sec. 48.

(By reason of the holding of the Circuit Court of Appeals touching the matter of illegal preference, first introduced by that Court.)

III.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Third Circuit erred in affirming the order of the United States District Court for the Eastern District of Pennsylvania denying the petitioner's prayer for leave to issue execution.

2. That the District Court of the United States for the Eastern District of Pennsylvania in this cause erred in entering the following Order, to-wit:

> "Sur petition of Bernard L. Shapiro for leave to issue execution.
>
> The petition is denied.
>
> BY THE COURT,
> W. H. KIRKPATRICK,
> *J.*"

3. The District Court of the United States for the Eastern District of Pennsylvania in this cause erred in refusing to grant the prayer of the petitioner, which prayer was as follows:

> "Wherefore your petitioner prays that your Honorable Court enter an order upon David Bachman and Horace B. Wilgus receivers in this cause requiring them and each of them to show cause why Bernard L. Shapiro the petitioner herein should not be permitted to issue a writ of *fieri facias* against the chattels and personal property in their possession as the same have heretofore been owned and possessed by Herbert P. Robinson in a cause pending in the Court of Common Pleas No. 4 for the County of Philadelphia as of December Term, 1930, No. 9223, in which your petitioner

is plaintiff and the said Herbert P. Robinson is defendant for the purpose of levying upon, seizing and selling the same so far as may be necessary to secure full satisfaction of your petitioner's judgment."

4. The District Court of the United States for the Eastern District of Pennsylvania in this cause erred in denying the prayer of the petition upon the petition of Bernard L. Shapiro, petitioner.

5. The District Court of the United States for the Eastern District of Pennsylvania in this cause erred in failing, by opinion, memorandum or other means to indicate upon the record of this cause, the cause of reasons for the entry of the order made herein, or for the refusal to grant the petition as prayed for.

[Specification of Errors 2-3-4-5 (Record p. 21) are those assigned in the appeal from the District Court to the Circuit Court of Appeals and the matter being here by the granting of the Writ of Certiorari these, in addition to specification 1 assigned in the Petition therefor, are all properly here for examination. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 567 (1931); U. S. v. Rogers, 255 U. S. 168 (1920).]

IV.

STATEMENT OF THE CASE.

Bernard L. Shapiro, a citizen of Pennsylvania, the petitioner, held a promissory note of Herbert P. Robinson, a citizen of Pennsylvania, for $1,000, which matured on December 19, 1930. On January 9, 1931, Robinson organized Miller Robinson Company in Delaware; on the same day conveyed all his assets to it, the corporation assuming his debts; and three days later, as holder of 99% of its stock, applied, with a simple contract creditor, for an equitable receivership, the corporation, in its answer, joining in the

prayer of the bill. The same day the United States District Court for the Eastern District of Pennsylvania appointed Coulbourn and Bachman receivers in the Equity proceedings; and on the next day Coulbourn was discharged and Wilgus appointed in his place. On January 16, 1931, the petitioner brought suit on his note in the State Court in Philadelphia County, Pennsylvania, obtained judgment by default against Robinson on February 4, 1931; and thereupon filed his petition against the receivers as respondents, in the District Court, for leave to issue execution on the judgment obtained in the State Court, against tangible personal property held by the receivers upon the theory that Robinson's acts were fraudulent as against creditors. The District Court denied the petition, without filing an opinion; and on appeal, the Circuit Court of Appeals affirmed this order. Robinson, the Court of Appeals said, though solvent, in order to prevent "threatened suits and the consequent destruction of his business", since "under the State law, a receiver cannot be appointed for an individual," had "procured the incorporation of the Delaware company, and in consideration of the issue to him of all its capital stock transferred to it all his property," the company assuming his debts; and had thus acted like an honest man in preventing preferences.

In the due course of procedure a petition for rehearing was filed in the Circuit Court of Appeals, which by its order without opinion filed, on January 28, 1932 denied the petition.

Thereupon the petitioner, Bernard L. Shapiro, on April 18, 1932, filed in this Court his petition for a Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit in consequence of which this Court by order filed May 16, 1932 granted the Petition for the Writ of Certiorari without condition or limitation.

V.

ARGUMENT.

Since as before noted the Writ of Certiorari herein was granted by this Court without condition or limitation by force of

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 567 (1931)

all questions raised by petitioner arising and apparent upon the records of both Courts below whether decided or noticed by such Courts are open for review. We believe, however, that fairness to this Court requires a distinction and division in argument falling into two categories, first, points specifically made the basis of the Petition for Certiorari here, and secondly those present in the records of the Courts below not employed for such purpose and so we shall divide and isolate it.

A.

POINTS RAISED BY THE PETITION FOR THE WRIT OF CERTIORARI:

1. **The Petitioner was unconstitutionally deprived of his right to a jury trial in the State Court.**
2. **That the proceedings in the District Court giving rise to the controversy were illegally collusive.**
3. **That the conveyance assailed in the controversy was fraudulent under the Uniform Fraudulent Conveyance Act of Pennsylvania and under 13 Elizabeth in force in that State.**
4. **That the Receivers' possession is not a legal obstacle to prevent attack upon the alleged fraudulent character of the transaction by customary procedural instruments employed in practice in the State where the transaction is assailed.**
5. **That a solvent debtor as to any of his creditors cannot create an illegal preference.**

B.

POINTS APPARENT ON THE FACE OF THE RECORD NOT PRESSED BY THE PETITION FOR CERTIORARI:

1. **Is it the duty of a judge in a Federal Court of the first instance in determining a matter falling within his jurisdiction to place upon the record by some method the reasons for his action?**
2. **By what methods of procedure are issues of fact in the Eastern District of Pennsylvania arising upon motions in equity proceedings to be determined?**
3. **Can the personal attributes of counsel promoting a given legal situation in any manner effect the legality thereof?**
4. **Does the present record disclose the action of counsel involved to be either able or honest as tested by acceptable standards?**
5. **Can posterior judicial action between strangers involving one of several legal issues be judicial justification for anterior judicial action between different parties based upon the other legal issues?**
6. **Does the transaction disclosed upon the Record violate the Pennsylvania Sales in Bulk Law?**

Out of an abundance of caution and not because it appears in any manner to be assailed, it seems wise by way of prelude to justify the procedural device employed by the petitioner upon the present record, which begets the contest, before approaching substantive matters. The record makes it plain (R. 11-15-16) that what the petitioner sought from the District Court was leave to issue execution against personal property in the hands of its Receivers. Is such procedure warranted by equity practice? This Court in

Wiswall v. Sampson, 14 How. 52 (1852)

gives the answer. Mr. Justice Nelson there writing declares p. 68: "It is competent and might in some cases be fit and proper *for the Court, where the property in dispute is ample and the litigation protracted to permit the execution to issue* and compel the prosecuting creditor to pay off the judgment."

Thus arises the primary inquiry was the property ample? Abundantly so, *by one hundred thousand dollars!* So found by the Circuit Court of Appeals (R. 23-24) and plainly admitted by respondents and the chief plotter swears to it (R. 13-17-6-7). Then would the litigation be protracted? This Court in the breadth of its judicial experience can best supply the answer and therefore judicially know whether the administration of Federal receiverships in equity are long or short, or how long or how short? No one suggests, nor does the record, that when this case came into this Court on April, 1932, the receivership had terminated, though it began January 12, 1931, hence we hope to be forgiven if we tenaciously hold to the notion that this falls in with the idea of Mr. Justice Nelson that this litigation even then was "protracted," leaving the future to care for itself. In that light we feel that the case made by the petitioner in the procedural zone meets all the conditions laid down by Wiswall v. Sampson, *supra*, even if it could entirely be kept out of mind, which it cannot, that *petitioner's assault is grounded on fraud.* Surely this element cannot be deemed as an undermining influence to the petitioner, for we know that when the element of fraud is present, the instrument of procedure adopted by the petitioner has always found approval in equity practice.

Russell v. East Anglian Rwy. Co., 3 MacN. & G. 125, 42 Eng. Reprint 208 (1850).

Gooch v. Haworth, 3 Beav. 428, 49 Eng. Reprint 168 (1841).

which latter is cited and followed by this Court in Wiswall v. Sampson, *supra*, p. 68.

It seems to follow therefore that upon the propriety of the procedure adopted by the petitioner in the District Court he cannot be dislodged.

Thus we come to points of substantive law as involved in this record and consider

A.

1. The petitioner was unconstitutionally deprived of his right to a jury trial in the State Court.

(Specification of Errors 1-2-3-4.)

A simple reading of the petition of the appellant, filed in the District Court (Record p. 11, *et seq.)* will definitely establish that the contention of the petitioner as embodied in that petition, was to vindicate his contention that Herbert P. Robinson and his co-conspirators, through the device of the Delaware Corporation to take and receive his assets and the receivership initiated by him with success three days thereafter, was a device to hinder, delay and defraud the petitioner in and about the collection of the petitioner's debt; or to put it in another way, declaring the transaction a fraudulent conveyance, which he sought to challenge by the instrument before and hereafter to be shown entirely appropriate for the purpose. This, of necessity, drew forth the answer of the respondents found in the record (R. 16 *et seq.)*, which in no manner attempts to traverse the facts which the petitioner pleaded in the petition, and filed at the bar of the District Court on the return day of the order to show cause. These pleadings then, which were all that was before the District Court on the return day of the order on March 4th, 1931, clearly, definitely and unmistakably manifested the fact that the petitioner was endeavoring to abrogate and nullify a fraudulent conveyance of personal property. That being his certain purpose, the petitioner contends now, as he contended in both Courts below uncompromisingly, that the only proper forum by which this might be done in the Federal Courts was by a trial by jury. The order appealed from must be

construed as a rejection of this contention, for we will not believe that the Courts below ever intended to hold that the petitioner was without other remedy, although any sort of implication may arise when the Court elects to keep silent upon this all important subject. Guessing as we must, we assume that the Courts below entertained the idea that Shapiro might press his contention before an auditor or master if and when the receivers should account, and certainly this is the best construction which can be placed upon the action of the Courts below in this phase of the matter. If that assumption be well founded, we deny here, that the petitioner, claiming to be defrauded by the fraudulent conveyance, can in the Federal Court, be compelled to test the issue before an auditor or master passing upon the receivers' accounts, and, so far as we now see it, the action of the Courts below offers the suggestion of nothing else.

In this regard, our clear and emphatic position is that the issue, made by the petition and answer alone can constitutionally be tried before a jury upon the petitioner's selection of that forum, and, as to a suitor claiming the right to a jury trial, the issue of a fraudulent conveyance cannot be tried before an auditor or master in an equity case against the creditor's objection. The basis of this contention is found in the Seventh Amendment of the Federal Constitution, reading as it does:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

This amendment, as bearing upon the question made by this record, came squarely before the Supreme Court of the United States in the leading case of

Scott v. Neely, 140 U. S. 106 (1890)

which unmistakably holds that so far as the *Federal Courts are concerned when the issue is fraudulent conveyance, the litigant has a constitutional right to a jury trial.*

This principle remains unimpaired in more recent times, for again it is held that in Federal Courts the *issue of fraudulent conveyance is to be determined by a jury and not otherwise.*

Adams v. Jones, 11 Fed. 2nd 759 (1926),

and this appears to be true in every issue arising in a common law action upon the ground of fraud, it being erroneous to transfer an action at law upon such ground to the equity side of the Court.

Issenhuth v. Kirkpatrick, 258 Fed. 293 (1919),

following in principle this Court in

Ex Parte Simons, 247 U. S. 231 (1918),

as amplified more recently by the same Court in the case of

Ex Parte Skinner & Eddy Corp., 265 U. S. 96 (1923)

holding, in effect, *that where a right to a jury trial in a State Court exists, no order may be made by a Federal Court, denying such right.*

All this is re-enforced when the petitioner's real objective comes to light, for all that he seeks is the payment of his debt in money and so, where the object of the action is the recovery of a mere money judgment, and, of course, this includes satisfaction, the Seventh Amendment insures to the suitor a jury trial.

Whitehead v. Shattuck, 138 U. S. 151 (1890).

This makes necessary to determine whether, by the law of Pennsylvania, where the transaction under present examination was consummated, would entitle the petitioner to a jury trial. There we see that the remedy of the creditor, claiming to be defrauded by a conveyance of personal property, is to initiate his remedy by a Writ of *Fieri Facias*, levying upon the subject of the conveyance (as was sought by the present pettion), has uniformly been regarded as a proper one for that purpose, as demonstrated by the Pennsylvania cases of:

Building & Loan Assn. v. Elleford, 258 Pa. 144 (1917).

American Trust Co. v. Kaufman, 276 Pa. 41-42 (1923).

Irwin v. Hess, 12 Pa. Sup. Ct. 163 (1893).

First National Bank v. Parks, 94 Pa. Supr. Ct. 570 (1928).

Montgomery Web Co. v. Dienelt, 133 Pa. 585 (1890).

Atlas Portland Cement Co. v. American Brick Co., 280 Pa. 449 (1924).

Delphia Mills Co. v. Richards, 62 Pa. Sup. Ct. 9 (1915),

and, of course, the Pennsylvania law is determinative in this connection, both as to matter of substance upon the issue of fraudulent conveyance,

Anderson v. Gray, 284 Fed. 773 (1922),

In Re Locust Building Co., 299 Fed. 764 (1924),

Lloyd v. Fulton, 91 U. S. 485 (1875),

Olcott v. Bynum, 17 Wallace 44 (1872),

and upon the procedural aspect by force of the Conformity Act, which is not strictly involved, the case arising in the Court of Common Pleas of Philadelphia County.

Now, the petitioner freely concedes that upon the issue of fraud, concurrent jurisdiction may also exist in equity, but the concession helps the respondents' situation not at all, for here the petitioner insists, as he has always insisted, that the validity of the transaction be determined by a jury, and, having taken that unwavering position, he cannot in the Federal Courts be deprived of the jury trial, first, because such deprivation can only be effected by an express waiver thereof in writing in the Federal jurisdiction.

Baylis v. Travellers Insurance Co., 113 U. S. 321 (1885),

and this record presents the very antithesis of any such writing.

And for a secondary reason, that though there may be such concurrent jurisdiction, the choice rests with the petitioner and not with the respondents, or any other person or authority, for where concurrent remedies for a cause of action subsist in different forums, the choice of the forum rests with the plaintiff,

Twist v. Prairie Oil Co., 274 U. S. 689 (1926),
"The Atlas", 93 U. S. 316 (1876),
Norton v. Switzer, 93 U. S. 356 (1876),
U. S. vs. Whited & Wheless, 246 U. S. 552 (1918).
Wallis v. Shelley, 30 Fed. 747 (1887),

and in recent times this principle is still unimpaired, for where one or more remedies are available, a party cannot be deprived of his right to elect which remedy he will pursue.

Hooper-Mankin Fuel Co. v. Railway Co., 30 Fed. 2nd, 500 (1929).

As the manifest effect and consequence of the order appealed from is to force the petitioner to challenge the

validity of the transaction in the equity proceedings before an auditor or similar officer, it follows *ex necessitate* that he is by that means deprived of a jury trial, which he elects to pursue, as guaranteed to him by the Seventh Amendment, for which reason, the order is erroneous and should be reversed.

2. That the proceedings in the District Court giving rise to the controversy were illegally collusive.

(Specification of Errors 1-2-3-4.)

The Circuit Court of Appeals in its opinion has pointed out (R. 24) that Robinson could not have obtained a receiver for himself in any State Court of Pennsylvania by force of

Hogsett v. Thompson, 258 Pa. 85 (1917),

no more could he have done so in a Federal Court

In re Richardson's Est., 294 Fed. 349 (1923).

Robinson therefore caused the creation of his Delaware corporation to escape the consequences of this state of the law, both local and Federal, for the transparent reason of conferring jurisdiction on the ground of diversity of citizenship upon the Federal Court in the Eastern District of Pennsylvania. This we maintain is expressly determined by Circuit Court of Appeals by its opinion (R. 24). In the light of such direct finding, the operation of Section 37 of the Judicial Code is made manifest. This reads as follows:

> "If in any suit commenced in a District Court or removed from a State Court to a District Court of the United States, it shall appear to the satisfaction of said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said

District Court, *or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein,* but shall dismiss the suit or remand it to the Court from which it was removed as justice may require, and shall make such order as to costs as shall be just."

Judicial Code, Sec. 37;
28 USCA, Sec. 80.

This section is practically an identical re-enactment of similar statutes which the Supreme Court of the United States has had occasion to construe and apply in many cases. Of these, those directly affecting the situation now made apparent by this Record are the cases of

Miller & Lux vs. East Side Canal Co., 211 U. S. 293, (1908);

Southern Realty Co. vs. Walker, 211 U. S. 603, (1909);

Lehigh Mining Co. vs. Kelly, 160 U. S. 327, (1895).

In *Miller & Lux v. East Side Canal Co., supra,* a California corporation instituted a bill in equity in a Court of that state against another California corporation, and thereafter caused the organization of a Nevada corporation, taking all of its stock, and conveying all its property to the new corporation. The suit in the State Court was discontinued, and a bill filed by the Nevada corporation in the United States Court, jurisdiction being obtained by the diversity of citizenship thus created. The Supreme Court held that the action was collusive, under the Statute, to "*invoke the jurisdiction of the Federal Court and avoid the determination of the rights of the parties in the Courts of the State* (p. 304);" and affirmed a decree dismissing the bill.

This cited case we think sufficiently coincides with the case now before this Court upon the facts as to justify the belief that it truly governs and makes necessary the same legal result here as there vindicated. The perplexing feature as to this limited aspect of the matter, in the light of the naked disclosure of Robinson's motives (R. 24) as unreservedly declared by the Circuit Court of Appeals, is to divine the reason why that Court so signally failed in its duty as prescribed by this Court, holding that, where the case made by the record falls within the purview of Section 37 of the Judicial Code, the Court of its own motion should raise the jurisdictional question and follow the mandate of this section to dismiss the proceedings.

Northern Pacific Steamship Co. v. Soley, 257 U. S. 221 (1921)

and the fact the situation was apparently ignored by the District Court affords no excuse to the Circuit Court of Appeals for following suit, and that without clamor by any litigant.

If it be asserted that the petitioner never moved for a dismissal as implied by Section 37 of the Judicial Code, there is a two-fold answer. The first is, if as he shall hereafter maintain and as is found by the Circuit Court of Appeals by its opinion, that Robinson's maneuvers were *to hold the petitioner at bay,* results in a legal fraud, as the petitioner shall maintain, then as to him the order complained of is a complete nullity because as declared by this Court "Hence the rule that whenever a judgment or decree is procured through fraud of either of the parties *or by collusion of both* for the *purpose of defrauding some third person,* such *third person* may escape from the injury thus attempted by showing *even in a collateral proceeding* the fraud or collusion by which the judgment was *obtained.*"

Michaels v. Post, 21 Wall 426-427 (1874).
No. Pacific Rwy. Co. v. Boyd, 177 Fed. 804 (1910) affirmed 228 U. S. 482 (1912).
Black Judgments, Sec. 293 2nd Ed.

So that if the petitioner's proceeding here be deemed collateral, he admittedly shows that the receivership was obtained collusively by Robinson the complainant and his creature the Delaware corporation the defendant, for the purpose of defrauding the petitioner by a legal fraud. In proof of this we need do nothing but refer once more to opinion of the Circuit Court of Appeals (R. 23-24) where the admitted facts of the situation appear in all their nakedness with the legal consequence that as to him these proceedings were a nullity.

The second answer is, that if the petitioner had sought relief by a direct motion for dismissal it would have rightfully been denied him *because such relief would have been too broad.* The record (R. 6) plainly shows that out of total assets amounting to $274,315.82 the amount of *tangible personal property* comprised therein was $52,338.19 (inventory) and this was all which by the Pennsylvania practice could be seized and sold by a writ of *fieri facias* in the first instance, which was the writ the petitioner prayed for. Hence it was necessary and proper that there must and should be a custodian for the rest of Robinson's assets in the Delaware corporation's possession amounting to $221,977.63, *which the petitioner never sought to reach,* when other good legal or equitable reasons being made to appear, would justify a receivership. *But the intangible assets of Robinson concern the petitioner not at all* the others being fifty fold sufficient to pay Shapiro, consequently had the latter sought more by a complete annihilation of the receivership by direct attack, if his was not such, he should have received a deserved rebuff and there-

fore his adherence to the course indicated by Wiswall v. Sampson, supra.

Now independently of Sec. 37, the performance of Robinson is equally vicious. To repeat the Court of Appeals has found that a Pennsylvania individual debtor cannot be put in receivership, either by himself or by his creditors. If then, that be the Pennsylvania law and the Federal Law as well, the present Record shows that the object sought and achieved by the machinations of Robinson by incorporating and entering the District Court were plainly to evade the consequences of that law and to procure a receiver for himself in a corporate guise, which the cases last cited *ante* pp. 14-11 show may and should readily be torn aside and penetrated and their true character exposed. This fraud upon the Pennsylvania Law being so demonstrated, it is entirely certain that such a proceeding presents a justiciable wrong of sufficient importance to procure the intervention of a Court of Equity.

Cole vs. Cunningham, 133 U. S. 107, (1889);
Sweeny vs. Hunter, 145 Pa. 373, (1891);
Galbraith vs. Rutter, 20 Pa. S. C. 556, (1902).

Hence we say that a person who is guilty of such acts as warrant equitable interference can by no process of reasoning be deemed honest or having an honest purpose, as the Circuit Court of Appeals holds (R. 24) *particularly not if that person, as also found by that Court, is desiring to preserve his own property against creditors whose judgments are unquestioned,* for it must never be lost sight of, as declared by this Court, that to deprive a party of the fruits of a judgment at law it must be against conscience that he should enjoy them. The party complaining must show that he has more equity than the party in whose favor the law has decided.

Brashear vs. West, 7 Peters 608 (1833).

How can it be against conscience for a man possessing a hundred thousand dollars to pay a judgment creditor whom he owes a thousand dollars, and how can anybody complain when the debtor who after paying all his debts except one retains a hundred thousand dollars shall not pay that one? It is perfectly certain therefore, that the acts which the petitioner complains are a flagrant violation of the law as embodied in Judicial Code, Sec. 37, as well as general legal principles.

Indeed to us it seems quite impossible to be otherwise, if the situation be, as stated by Mr. Justice Brewer speaking for this Court in

South Dakota v. North Carolina, 192 U. S. 320 (1903),

He says:

> "The award of execution is a part, and an essential part of every judgment passed by a Court exercising judicial power. *It is no judgment in the legal sense of the term without it.* Without such an award, the judgment will be inoperative and nugatory, leaving the party aggrieved without a remedy."

carrying with it an earlier corollary that

> "So long as the judgment remains in force, it is in itself evidence of the right of the plaintiff to the thing adjudged and *gives him a right to process to execute the judgment.*"

Voorhees v. Bank of the United States, 10 Peters 473 (1836).

Huff v. Hutchinson, 14 Howard 588 (1872).

We believe therefore to have established that the proceedings for the receivership herein are demonstrated to be illegally collusive, a vice that renders them as to the present petitioner no barrier to the success of the remedy

he sought in the District Court, making certain that upon this ground the order appealed from ought to be reversed.

3. That the conveyance assailed in the controversy was fraudulent under the Uniform Fraudulent Conveyance Act of Pennsylvania and under 13 Elizabeth in force in that State.

(SPECIFICATION OF ERRORS 1-2-3-4.)

It will be a vain search of the opinion of the Circuit Court of Appeals for the slightest intimation bearing upon the subject incorporated in this heading, notwithstanding *it was the express foundation of the petitioner's claim in all Courts below* (R. p. 12-13-14). True it is, that it is there stated that petitioner made no attempt to prove fraud, as to which see argument *post* p. 37 *et seq.*

So far as we understand this statement we believe the Court intended to imply that the petitioner attempted to prove *no fraud in fact.* If so, that is quite correct.

The principal reason for this seeming omission among others is that the facts found by the Circuit Court of Appeals (R. p. 24) and admitted by respondents' answer (R. p. 16 *et seq.) establish fraud in law.* The very best the respondents' answer sets up, admitting all the facts averred and found by the Circuit Court of Appeals, *was a denial of fraudulent intent* neither more nor less. In that situation, we with all propriety invoke Mr. Justice Bradley, in

Lathrop v. Drake, 91 U. S. 520 (1875)

where that Judge writes:

> *"The general denial of fraud in the answer of the defendants is the equivalent to nothing more than a denial of a conclusion of law."*

So that question presented by the respondents' answer raises and raised merely questions of law. In the main these arise upon Uniform Fraudulent Conveyance Act of Pennsylvania and 13 Elizabeth in force in that State.

The Uniform Fraudulent Conveyance Act in force in Pennsylvania, Acts of Assembly of the Commonwealth of Pennsylvania, May 21, 1921, P. L. 1046-1047, Purdon's Digest Title 39, Sections 354-355 in Section 5, reads as follows:

> "Every conveyance made without fair consideration when the person making it is engaged, or is about to engage, in a business or transaction for which the property remaining in his hands after conveyance is an unreasonably small capital, is fraudulent as to creditors and other persons who may become creditors during the continuance of such business or transaction *without regard to his actual intent.*"

And in Section 4 reads as follows:

> "Every conveyance made, and every obligation incurred, by a person who is or will be thereby rendered insolvent, is fraudulent as to creditors *without regard to his actual intent,* if the conveyance is made or obligation is incurred without a fair consideration."

A plain reading, therefore, of these Sections, especially the portions of them which we have italicized, makes it certain that as to a man in business as Robinson most certainly was, *the actual intent of the grantor is wholly immaterial.*

The Circuit Court of Appeals (R. 24) directly finds that these conveyances by Robinson transmuted all his assets into the entire incorporeal stock issue of the Delaware corporation brought into being for this very purpose, demonstrating the presence of the double weakness of the lack of fair or any consideration, and the entire stripping of Robinson of all his capital, *the precise conditions proscribed by both of the above quoted sections of Uniform Fraudulent Conveyance Law.*

In this connection we do not ignore that part of the opinion of the Court below which refers to the assumption by the Delaware corporation of all of Robinson's debts including the petitioner's. Of what consequence may this be? We say none whatever. It is self evident we think that all that possibly could be achieved by this phase of the scheme had it been consummated, was to work a substitution of debtors, the Delaware corporation in lieu of Robinson but in that development that Circuit Court appears wholly to have forgotten *that there can be no legal substition of debtors without the consent of the creditor.*

Coyle v. Coal Co., 289 Fed. 435 (1923).
In re Bonk, 268 Fed. 1015 (1920).
Illinois Car Co. v. Linstroth Wagon Co., 112 Fed. 740-741 (1902).
Vance v. Clay Manufacturing Co., 82 Fed. 251 (1897).

And the Pennsylvania Law is the same.

Jones v. Casualty Co., 255 Pa. 573 (1917).
McCartney v. Kipp, 171 Pa. 647-648 (1895).

And if this record conclusively establishes anything, it establishes the fact that *Shapiro, the petitioner, never consented to any such substitution.*

Nor does the respondents' position improve in the light of 13 Elizabeth in force in Pennsylvania. As applied to facts disclosed by this record the Supreme Court of Pennsylvania has stated in

Zerbe v. Miller, 16 Pa. 488-497 (1851)

that:

"The consideration of a sale may amount to the value of the land sold, *and yet the sale be fraudulent as against creditors, because such sale may delay, hinder, and obstruct them in the collection of their*

*debts. And a sale for value may not only delay and hinder them but may also be made for that very purpose and intent * * * It is the intent that gives character to the transaction; and when the acts corresponds with the intent, and both concur in delay and hindering creditors, the deed is void."*

The same Court speaking in

Hennon v. McClane, 88 Pa. 219-222 (1878)

reiterated this principal in unmistakable language thus:

"The Statute of 13 Eliz. being directed against conveyances that *hinder and delay* (the italics are the court's) creditors, * * * bargains which * * * tie up property out of reach of creditors, preventing the collection of their debts in the ordinary course of law, are held to be against the Statute, and fraudulent in law".

These quotations accurately and graphically describe the operation of the scheme of Robinson and his cohorts upon this record making certain that by virtue of 13 Elizabeth embodied in the common law of Pennsylvania must strike it down as palpably illegal. And so it is everywhere.

That fraud exists under these circumstances has been squarely decided by the Circuit Court of Appeals for the Second Circuit, on facts almost identical with ours.

In re: American Candy Mfg. Co., 256 Fed. 87 (1919)

a corporation conveyed all its assets to another corporation, the latter assuming its debts, the former thus becoming insolvent. Bankruptcy of the second corporation followed; and a creditor of the first, who had obtained his judgment after the conveyance, petitioned to set aside sufficient of the bankrupt's property to pay his debt. All the other creditors

had filed claims against the bankrupt, and had not joined in the petition. Judge Hough held the conveyance fraudulent, and granted the relief prayed for, pointing out that the petitioner might have levied an attachment on the property fraudulently conveyed. And Judge Hand, in a similar case

Empire Lighting Fixture Co. v. Practical Lighting Fixture Co., 20 Fed. 2nd 295 (1924)

pointed out that *an intent to delay will defeat such a conveyance as effectively as an intent to defraud;* and that no consideration will support a fraudulent conveyance. The cases are under a New York Statute, but express the universal common law principle.

Nothing could be surer than the presence of intent to delay on the part of Robinson and his co-conspirators upon this record for it is expressly found by the Circuit Court of Appeals (R. 24) in this fashion. "So * * * * * * he followed the only course open to him to effect his honest purpose *of preventing the sacrifice of his property thwarting all efforts of his creditors* to get preferences and *ensuring the continuance and gradual liquidation of his business* and an equal distribution among all his creditors." No stronger phrasing could be adapted to show that the primary and paramount motive of Robinson was delay, delay and more delay, precisely the condition reprehended by all authorities since it is a maxim that *"Qui serius solvit, minus solvit"*

Louisiana v. New Orleans, 102 U. S. 207 (1880),

he who pays late, pays less, and makes increasingly astonishing the accolade placed on Robinson and his professional co-workers by the Court below as "honest". The difficulty here may consist in the fact that this adjective is there employed in a sense with which the rest of us are wholly unfamiliar, always aggravated by the knowledge

that Robinson had one hundred thousand dollars and would not pay the one thousand owed to the petitioner.

Consistent with the foregoing, as we deal here with a Pennsylvania transaction, we revert again to the Pennsylvania law there to find its law in complete harmony with what has gone before. This is fixed by the cases of

Montgomery Web Co. v. Dienelt, 133 Pa. 585 (1890),

Atlas Portland Cement Co. v. American Brick Co., 280 Pa. 449 (1924),

Delphia Mills Co. v. Richards, 62 Pa. S. C. 9 (1915),

which cases, upon the facts and for the remedies sought, are in no material aspect to be distinguished from the case made in the present record. In those cases, the offended creditor successfully broke through the screen of corporate formation of his debtor's existing business, which is precisely what the petitioner contends for in the present case, and it is of more than usual significance that in the cases last cited, the instrument of attack employed was identical with that which in the present instance was denied to the petitioner, to wit: The issuance of a *fieri facias* and consequent property claim and Sheriff's Interpleader, and ought to have been the sequel in the Court below, for the machinery on Sheriff's Interpleader seems without abatement to apply in the Federal Courts in Pennsylvania, as well as in the State Courts.

United States v. Kinney, 264 Fed. 542 (1920).

Nor need the inventors of the contrivance now under attack comfort themselves with the notion that they have here created a novelty, for we think it plain that long before their brain child was begotten collusive receiverships

have been held failures as devices to hinder, delay or defraud creditors.

Metcalf v. Moses, 161 N. Y. 587, 56 N. E. 67 (1900),

Schloss v. Schloss, 14 App. Div. 333, 43 N. Y. Supp. 788 (1897),

Link Belt Machinery Co. v. Hughes, 195 Ill. 413, 63 N. E. 186 (1902),

Manhattan Trust Co. v. Seattle Coal Co., 16 Wash. 499, 48 Pac. 333 (1897),

Gooch v. Haworth, supra.

Russell v. East Anglian Rwy. Co., supra.

We therefore submit that the transaction manifest upon this record is contrary to Uniform Fraudulent Conveyance Act of Pennsylvania and 13 Elizabeth in force in that State. It also violates the Sales in Bulk Law of that State concerning which for reasons hereinafter appearing we shall write at another place *post* p. 46.

However, at this place it is sufficient to declare that upon the two phases of the law just considered the order appealed from is wrong and should be reversed.

4. That the receivers' possession is not a legal obstacle to prevent attack upon the alleged fraudulent character of the transaction by customary procedural instruments employed in practice in the State where the transaction is assailed.

(Specification of Errors 1, 2, 3, and 4.)

By the Pennsylvania practice, upon the facts shown by this record, the approved instrument of attack was the issuance of and seizure by writ of *fieri facias* against the tangible personal property sought.

Montgomery Web Co. v. Dienelt, supra,

Atlas Portland Cement Co. v. American Brick Co., supra,

Delphia Mills Co. v. Richards, supra,

because in that State:

> "A conveyance of property made by a debtor to defraud creditors is void as to them * * * and the title for the purpose of enabling creditors to enforce their debts remains in the grantor * * * A judgment creditor is allowed to levy upon and sell any title * * * alleged to be in the grantor * * *"
>
> *American Trust Co. v. Kaufman,* 276 Pa. 39 (1927),

effecting a complete reconciliation with the approved practice prescribed by *Wiswall v. Sampson, ante,* p. 6.

So that in the present instance the approved procedural instrument was sought to be employed.

Now certainly the Receivers' title or rather, right of possession, added nothing to the title of the Delaware corporation in which place they stood, for by

> *Fosdick v. Schall,* 99 U. S. 251 (1878):
>
> "The possession taken by the receiver * * * adds nothing to the previously existing title * * *."
>
> *In re American Candy Mfg. Co.,* cited *supra,* p. 89:
>
> "The trustee in bankruptcy stands in the shoes of the (bankrupt which) * * * took nothing by the conveyance, except what remained after accounting to * * * non-consenting creditors."

And to like effect

> *Grant v. Insurance Co.,* 106 U. S. 432 (1882).

So that there is singular relevancy in what is found in a most recent decision of this court declaring that:

> "This Court has had occasion to point out the *abuses* that can arise from *friendly receiverships forestalling the normal process of administration in bankruptcy and enabling a tottering business to continue while creditors are held at bay* * * *. Receiverships

for conservation *have at times* a legitimate function, but they are to be watched with jealous eyes lest their function be perverted. * * * To protect through a receiver the corporate privilege and use the appointment as a barrier to the collection of a tax that should accompany enjoyment would be an injustice to the State and *a reproach to equity.*"

Cardozo, J., in:

Michigan v. Michigan Trust Co., May 16, 1932, October Term 1931, No. 598, not yet officially reported.

The italics are ours. True it is that the facts of that case are superficially different from those present in this record. If, however, in the quotation made we substitute "debt" for "tax" and "petitioner" for "state" complete identity is established and the vigorous criticism of Cardozo, J., there operates to the entire annihilation of Respondents' defense here, for what does the record show but an attempt to forestall processes of bankruptcy and enable the continuance of a business while the creditors are held at bay? Moreover would not the continuance of the status complained of operate as against the petitioner *as an indefinite stay of execution*, unconstitutional in itself

Edwards v. Kearzey, 96 U. S. 601-602 (1877)
Cooley Constitutional Limitations 8th Ed. p. 597

and hence inaccessible to Robinson with the sequel that as crystallized in the maxim *Nemo potest facere per obliquum quod not potest facere per directum*—"What cannot be done directly cannot be done indirectly."

Cummings v. Missouri, 4 Wall. 325 (1886).
Clarke v. Clarke, 178 U. S. 191-192 (1889).
The Commercen, 1 Wheat. 382 (1816).

Macallen Co. vs. Massachusetts, 279 U. S. 629 (1928).

Langdon v. Branch, 37 Fed. 463 (1888).

It follows, therefore, all other factors in the case being unimpaired, the presence of the collusive receivership here presents no bar to the relief sought by the petitioner for which reason the order appealed from ought to be reversed.

5. That a solvent debtor as to any of his creditors cannot create an illegal preference.

(Specifications of Error 1, 2, 3, 4.)

The dominant motif of the opinion (R. 23 *et seq.*) delivered in this cause by the Court below is "preference". By a singular famine in adjectives, the writer of that opinion has nowhere described the "preference" he assumes to reprehend as an illegal or legal preference. Since, however, we are in a juristic environment when we assume to consider this opinion, we feel we do no violence to the word used when we assume that what the writing judge intended by the naked word "preference" he meant "illegal preference" for if it is otherwise, it is hard to understand that anything is meant. Using then the phrase "illegal preference" in place and stead of the word "preference" when it appears in the opinion, how does the matter stand? We submit that so far as "illegal preference" is concerned with complete deference to the Court below, its conclusions as contained in the opinion as a legal proposition are wholly insupportable. We make this seemingly bold assertion because we are convinced *that upon the state of the record as disclosed by the very opinion itself, "illegal preference" as to the petitioner was a legal impossibility.*

We shall deal with this phase of the matter, though that Court has failed to do so, in its opinion in its two aspects.

First as regards the National Bankruptcy Act and secondly independently of that act.

As to the National Bankruptcy Act that statute provides:

"A person shall be deemed to have given a preference if, *being insolvent,* he has within four months before the filing of the petition, or after the filing of the petition and before adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect or enforcement of such judgment or transfer will be to enable anyone of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer such period of four months shall not expire until four months after the date of recording or registering of the transfer, if by law such recording or registering is required or permitted."

Sec. 60A, National Bankruptcy Act, as amended May 27, 1926, 44 Stat. Chap. 406, Sec. 14, 11 USCA Sec. 96.

The same Statute again provides:

"Acts of Bankruptcy by a person shall consist of his having * * * (3) suffered or permitted *while insolvent* any creditor to obtain a preference through legal proceedings and not having at least five days before a sale or other disposition of any property effected by such preference vacated or discharged such preference; or (4) suffered or permitted *while insolvent,* any creditor to obtain through legal proceedings any levy, attachment, judgment or other lien and not having vacated or discharged the same within 30 days from the date such levy, attachment, judgment, or

other lien was obtained; or (5) made a general assignment for the benefit of his creditors, or *while insolvent* a receiver or trustee has been appointed or put in charge of his property; or (6) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground * * *."

Sec. 3, National Bankruptcy Act, as amended May 27, 1926, 44 Stat. 662 Chap. 406 11 USCA Sec. 21.

Recurring now to the opinion, the Court referring to Robinson, the debtor, we use the exact words to avoid the possibility of error, found *"He was solvent to the extent of a hundred thousand dollars."* (R. 23.)

This being a fundamental and overpowering finding, as we view it, we submit with the utmost emphasis measured by the express words of the Bankruptcy Act above quoted that no illegal preference could in any degree arise by force of the provisions of that act by anything which Shapiro, the creditor petitioner, might have done by way of enforcing his judgment by any sort of execution, because the sections quoted show *that preference by legal proceedings can only come into being while the debtor is insolvent.* To hold the contrary simply tears out of the sections quoted the express words of the statute and consequently, as may well be expected, all the authorities upon the subject hold that there can be no illegal preference under the Bankruptcy Act unless and until *the debtor be insolvent and that a solvent debtor cannot create a preference.*

Remington Bankruptcy, Sec. 1739, 3rd Ed.
Collier Bankruptcy, 13th Ed., Vol. 2, P. 1250.

Citing a host of cases from all the Circuits in the United States.

Thus it is manifest that so far as the National Bankruptcy Act may be thought to be involved, as it bears upon an illegal preference in the present record, the conclusion of that Court is at variance with all authorities.

As to the law independent of the Bankruptcy Act.

We assert with equal confidence that there can be no preference in the law removed from the zone of Bankruptcy where the debtor is not insolvent. In short that *insolvency* in regard to relations between debtor and creditor is the heart of every illegal preference, the latter being incapable of existing without the former. This is shown in its most simple form by the legal definition of the word "preference" itself, thus "Preference—The paying or securing to one or more of his creditors by an *insolvent* debtor, the whole or part of their claims to the exclusion of the rest."

Bouvier Law Dictionary, 3rd Ed. Vol. 3, P. 2662.

Thus it is made manifest that no correct conception of preference in a legal sense can be entertained where the debtor involved *is solvent, as Robinson in the present case was, to the extent of a hundred thousand dollars, as found by the Court itself.*

In this connection it is but fair to observe that this element of preference is an innovation brought into the Record by the Court of Appeals alone, for the District Court in its comprehensive silence, necessarily made no reference to it, nor did the receivers by their answer ever suggest its presence in the Record.

We feel therefore that so far as the Statute and the General Law is concerned in the very essence of the case, neither the creditor Shapiro could receive nor the debtor Robinson give a preference, in the light of the *legally in-*

surmountable solvency of Robinson. This is emphasized when we look into the authorities touching preference when removed from statutory considerations. What we mean by this is to reiterate and reiterate that both by the Law of the United States and the State of Pennsylvania where this transaction was had a preference even if Shapiro would have had the good fortune to acquire it, according to his undoubted clear legal and equitable right, no legal or equitable objection against it could be rightfully interposed, for at common law the obtaining of a preference by a creditor is entirely legal.

Huntley v. Kingman, 152 U. S. 527 (1894).
Blennerhassett v. Sherman, 105 U. S. 117 (1881).
May v. Tenney, 148 U. S. 60 (1892).
Crawford v. Neal, 144 U. S. 595 (1891).
Tompkins v. Wheeler, 16 Peters 116 (1842).
Brooks v. Marbury, 11 Wheat. 78 (1826).
Clarke v. White, 12 Peters 178 (1838).
Brashear v. West, 7 Peters 608 (1833).
Magniac v. Thompson, 7 Peters 348 (1833).

We would remark that the rule applies in equity without abatement for *Crawford v. Neal, supra; Tompkins v. Wheeler, supra; Clarke v. White, supra,* and *Brashear v. West, supra,* are all cases in equity.

The law of Pennsylvania is the same as is established by
Love v. Clayton, 287 Pa. 215 (1926).
Schimmel v. Cohen, 275 Pa. 121 (1922).
Smith v. Keener, 270 Pa. 582 (1921).

A reader of the opinion of the Court of Appeals in this matter cannot escape gathering the impression that the Circuit Court wholly approves of the order of the District Court as an act which prevented the commission by the creditor Shapiro of some inequitable, unjust or other base

proceeding for which Shapiro should be duly reproved. It is submitted that this attitude is completely at variance with the theory of the Supreme Court of the United States, which we suppose is still controlling in the Court below, when the former was dealing with the situation there thought to be censurable. The Supreme Court in *Blennerhassett v. Sherman, supra,* speaking by Mr. Justice Woods, p. 117, declared,

> "It is not to be disputed that except as forbidden by the Bankrupt Law, the debtor has a right to prefer one creditor over another and *that the vigilant creditor is entitled to the advantage secured by his watchfulness and attention to his own interests.*"

Thus it appears that the view of this Court hardly coincides with those of the Court below in a similar situation, nor can that Court's attitude of criticism of the petitioner be justified so far as it seems to disapprove of Shapiro's persistent efforts to collect the whole of his debt approximating a thousand dollars from *his debtor who has a hundred thousand dollars.* We believe the correct attitude of the law in this regard is expressed in the maxim

Vigilantibus et non dormientibus leges subvieniunt.

Lupton v. Janney, 13 Peters 386 (1839).
New York v. Pine, 185 U. S. 98 (1902).
Hawkins v. Barney, 5 Peters 466 (1831).
Ricard v. Williams, 7 Wheat. 116 (1822).
Magee v. Insurance Co., 92 U. S. 98 (1875).

The law assists the diligent and not those who sleep on their rights.

It follows therefore that so far as the judgment of this Court of Appeals affirming the District Court below is based upon the theory of illegal preference it is plainly erroneous and the order should be reversed so far as it is based upon this mistaken theory.

As we approach the conclusion of this phase of the matter we again direct this Court's special attention that the contention of "preference" or "illegal preference" never was made or suggested in this case until the Circuit Court of Appeals in this case rendered its opinion on December 31, 1931. The District Court being wholly silent, necessarily did not do so. The Petitioner having no incentive, naturally did not do so. The Respondents, as measured by their answer (R. 16 *et seq.*) never dreamt of it. Consequently it is the invention of the Circuit Court of Appeals, as a device for justifying the unjustifiable and therefore creates a situation in our judgment entirely parallel to that producing the criticism of this Court in

Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257-267 (1909);

where it is held that a Circuit Court of Appeals which decides a cause upon a ground urged by neither litigant in that Court or in the Court below, deprives the losing party of his day in court upon that issue and renders its judgment erroneous on that account. This must be especially true in the present instance, where this error is much enhanced by the fact, that upon discovery, this fallacy was made one of the specific subjects for reconsideration upon the Petition for Rehearing in that Court, being points 1a-1b of that petition filed, and denied without further comment, January 28, 1932. (R. 26.)

Thus we conclude the presentation of the five points raised by the Petition for Certiorari and proceed to

B.

Points apparent from the face of the record not pressed by the Petition for Certiorari.

Story Parchment Co. v. Paterson Parchment Paper Co., ante, p. 3.

1. Is it the duty of a judge in a Federal Court of the first instance in determining a matter falling within his jurisdiction to place upon the record by some method the reasons for his decision?

(Specification of Error 5.)

The petitioner has no means of knowing by what gauge the District Court might determine the relative importance of a matter before it, and, therefore, in the encompassing silence of its record, is unable to state whether or not that Court deemed the matter, which has begotten his petition, of any importance whatever. However that may be, the petitioner regards it of importance, since the inevitable effect of the order appealed from has postponed for the past, and promises to postpone indefinitely for the future, the collection of the sum of $1007.65 owing to him upon circumstances to which no legal defence has ever been suggested and ample means of payment exist, and, since he has not yet reached that state of affluence where the amount involved is of no significance, upon personal grounds alone, he regards the matter important enough, to say nothing of the interest of the litigating public, whose interest he makes no present pretense of vindicating, to know just how Courts in a given instance act, and why.

So that the petitioner does not regard it in any sense impertinent to complain that in this case, as in every case, reasons for judicial action should be made to appear upon the record, for it is by this means alone that Courts may hope to escape the implication that they act arbitrarily in the nature of imperial fiats, and for the better motive for simplifying the tasks of Courts of Review in cases such as the present case, which, as the argument preceding has revealed, is free of all frivolous and unsubstantial legal questions, and thus evade the necessity of placing upon the litigant, as here, the increasingly difficult burden of shooting at an invisible target.

Our plaint in this regard has well been anticipated by this Court, speaking by Mr. Justice Brandeis, where he writes:

> "Unless the opinion indicating the grounds of decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the Appellate Court. This is particularly true *where the case is in equity* and a decree is entered upon a hearing involving complicated facts. *For, being in equity,* matters of fact as well as law are reviewable; and the reviewable issues of law are sharply defined by request for rulings. *The failure to accompany the decree by an opinion may thus deprive litigants of exercising a sound judgment on the propriety of an appeal; and the Appellate Court, being without knowledge of the grounds of the decision below, is denied an important aid in the consideration of the case and will ordinarily be subjected to much unnecessary labor.*"
>
> *Virginian Railway Co. v. U. S.,* 272 U. S. 675 (1926).

Certainly nothing that the petitioner could say in the present instance can be more apt to or descriptive of the situation in the present record in the District Court than what is here quoted, and, therefore, nothing upon this score will be attempted to be added.

Indeed, it is altogether plain that a record which discloses no reasons for decision, is in such form as to preclude action by an Appellate Court *requiring the decree to be set aside* to enable the Court below to state its reasons upon the record.

> *Railroad Commission v. Maxcy,* 281 U. S. 82 (1930).

2. By what methods of procedure are issues of fact in the Eastern District of Pennsylvania arising upon motions in equity proceedings to be determined?

(SPECIFICATION OF ERRORS 1, 2, 3, 4, 5.)

Among the many technical heartaches begotten by this record, none is more painful to record than that embodied in the language of the Circuit Court of Appeals (R. 24-25):

> "He presented a petition to the Court below, alleging the chartering of the company, the transfer of Robinson's property to it, the filing of the bill, the appointment of receivers were a fraud—assertions which were denied by answer—*of which unwarranted statements no proof whatever was made.*"

If it should appear that counsel are unduly affected by the italicized portion of this quotation, a part of their indignation and disapproval can well be understood when it is pointed out that the 6th question they propounded to the Court of Appeals was as follows:

> "6. By what method of procedure in the Eastern District of Pennsylvania are issues of fact, arising upon motions begotten by equity proceedings, to be determined?"

Petitioner's Brief in the Circuit Court of Appeals, p. 35.

The question was begotten in this manner:

Sec. 2 of Rule 8 of District Court (at law) reads as follows:

> "Depositions may be taken upon forty-eight hours' notice before an examiner or commissioner appointed by the court or before any person authorized under Acts of Congress to take evidence * * *"

Rule 8, Sec. 2 of Rules of District Court, E. D. Pa.

Federal Equity Rule 47 provides as follows:

"The court upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses to be used before the court or upon reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order * * *."

Federal Equity Rule 47.

And Federal Equity Rule 46 reads thus:

"In all trials in equity the testimony of witnesses shall be taken orally in open court except as otherwise provided by statute or these rules * * *."

Federal Equity Rule 46.

As a result of that state of procedure and *the fact the Respondent's answer was filed at the opening of Court at the bar upon the return day of rule and not earlier,* the Petitioner then in support of his petition handed to the presiding judge (Kirkpatrick, D. J.) his brief, the introductory portion of which read, as follows:

"As this matter develops, we believe it will be found that the most bothersome feature that it presents is a precedent determination of the manner by which the pending matter is to be adjudicated. By this, we mean that Counsel for the petitioner has not, at this time, determined what course to pursue, because of the uncertainties of the situation now to be noticed.

"It will be observed that this is a suit in equity, and, therefore, the procedure at law, so far as it may be governed by particular Rules prevailing in this district, can have no application. What we mean in this connection is that Section 2 of Rule 8 of the Rules of this District, pertaining to suits at law, make provi-

sion for the taking of depositions in a case where that is desirable, and we think that if such a Rule were applicable to the present case, the situation involved in it would be such to make the taking of depositions essential."

"But here we meet difficulties, and they arise in the main from the belief that the Federal Equity Rules do or should apply to the situation presently at the Bar."

"If that is true, the merest reference to Federal Equity Rule 47 makes it plain that the taking of depositions is exceptional, and that, by force of Federal Equity Rule 46, the general policy of the equity practice is to take the testimony in open Court. Hence, we incline to the opinion that so far as the present application may involve issues of fact, testimony in support thereof should be taken in open Court; but this inclination affords no positive solution of the question now propounded, and this because it seems that upon a motion in an equity case, the mode of trial is discretionary with the Court.

Frances Investment Co. v. Thomason, 11 Fed. 2nd 229 (1926).

42 Corpus Juris 506, Sec. 130."

"Especially so since the determination of questions of fact on *ex parte* affidavits in equity causes is not favored in the Federal Courts.

Decorative Stone Co. v. Building Trades Council, 13 Fed. 2nd 123 (1926)."

"So that, if the Court should determine there are issues of fact arising upon the record as made, the petitioner does not want to fall between stools in the selection of a course of procedure, but shall expect the Court to indicate the method of trial of these issues, as

is declared in *Frances Investment Company v. Thomason (supra).*"

"Even in these less important aspects of the matter the Court below maintained its unexplainable taciturnity. It gave no indication how the issue of fact should be tried, assuming that there was an issue of fact, and, therefore, we stand in the same enshrouding ignorance at this late stage of the proceedings as we did at their inception, and therefore, elect not to let the opportunity pass to obtain from this Court some declaration for the future guidance of the profession in this regard."

The foregoing excerpt is a literal copy of pages 35-36-37 of the Petitioner's Brief in the Circuit Court of Appeals so that in addition, in the partisan minds of counsel, to being an unjust and unfair statement of the case touching this phase of it, it likewise makes baffling and incomprehensible the position of the Circuit Court of Appeals *so far as it asserts any failure on the part of the Petitioner to prove the averments of his petition,* and more, because this striking vice is augmented by the fact, that though this situation was again directly brought to that Court's attention by reason (6 a) of the Petition for rehearing which by the Practice of this Court, the Clerk does not print, (R. 26) it never even attempted to cure the error so palpable, in the light of the true situation, always actually before it.

3. Can the personal attributes of counsel promoting a given legal situation in any manner effect the legality thereof?

(Specification of Error 1.)

4. Does the present record disclose the action of counsel involved to be either able or honest as tested by acceptable standards?

(Specification of Error 1.)

We deplore exceedingly that the Court of Appeals in delivering its opinion in this matter has found it necessary

to state that Robinson in the perpetration of his fraudulent scheme did so "Under the advice of honest and able counsel." (R. 24.) Certainly nothing that the Petitioner has ever stated in the slightest degree impugned or criticized the acts or advice of any attorney opposed to him or in the service of Robinson, whatever ideas might be entertained upon the subject. Thus it would appear that the expression of the Court now pointed out is a spontaneous defense of someone against a non-existing accusation and begets the misgivings that all similar situations engender, for certainly the prickings of some attorney's conscience are not to be laid at our door. It is for this reason therefore that we would have much preferred the quoted statement to have been entirely omitted from the opinion because its presence necessarily calls upon us to test its justification upon the facts of the record. We understand it to be a fundamental of appellate jurisdiction that the reviewing Court is confined to matter apparent only on the face of the Record.

Suydam vs. Williamson, 20 Howard 432 (1837).
Evans vs. Stettnisch, 149 U. S. 607 (1892).

As we read the Record, *there is not an averment therein which mentions or reveals who was Robinson's attorney in the promotion of his fraudulent enterprise prior to the filing of the bill herein* so we can have no means of knowing how Court of Appeals ascertained that fact. However, that may be if Robinson's scheme was promoted by an attorney, and dehors the record, we know this, we wonder how this information touching his identity being withheld by the Record, can justify the Court in the light of such concealment, in holding the attorney either to be honest or able or both. Is it possible that this conclusion is based on the fact that the fraudulent scheme which was concocted by an attorney having been brought to a successful conclusion proves the attorney's honesty

and ability, ergo, that an attorney who unsuccessfully opposed it is dishonest or incapable! Would not such an attempt at classification require a complete certification of the personnel that comprise the Bar of any Court, and would not such certification or classification be a boon to every rogue in the laity who desiring to promote dishonest litigation, need only to employ such attorneys whom in the Court's judgment were honest and capable and profit accordingly? What a potential public menace is this? In truth we believe the departure in the present instance touching the ability and morals of attorneys appearing at the Bar of the Court below when hidden by the Record, trenches upon principle, for a Court cannot judicially know the particular facts concerning an attorney practicing at its Bar.

23 C. J., 108, Sec. 1914.

If it could, and carry its investigation in this case beyond the Record before it, we would be shocked to discover that despite the actual facts, the Court below would attempt to maintain that the counsel involved was either honest or able, for the facts are, that the individual who was Robinson's attorney was the same attorney who procured the Delaware Incorporation, was the same attorney who represented the complainants in the receivership suit, and is the same attorney representing the Respondents in the present litigation, in all the Courts below. It is because of this multiple employment that we withhold agreement with the Court that the honesty and ability of the particular attorney is established and this doubt is engendered almost exclusively by the Sixth Cannon of Ethics of the American Bar Association and such authority as

Blair vs. The Railway Co., 20 Fed. 348 (1884).

High Receivers, Fourth Ed. Sec. 188, 216.

Therefore, with much pain and regret we submit that so far as the hypothesis of the character and ability of counsel concerned in this litigation may effect the result, the order appealed from is wrong and should be reversed.

5. Can posterior judicial action between strangers involving one of several legal issues be a judicial justification for anterior judicial action between different parties based upon the other legal issues?

(Specification of Error 1.)

The concluding portion of the opinion of the Court of Appeals now under examination reads as follows: "As the action of the Court below was embodied in the four word order 'The petition is denied' we refer to the opinion of the painstaking judge who in a similar unwarranted application of another creditor set forth the reasons why such a course would not be sanctioned." (R. 25.)

Since this quotation in no manner identifies what is referred to, we are left the hazard of conjecture. We are reasonably certain that what is intended to be referred to is an opinion by Kirkpatrick, D. J., filed in the Court below as of the same term and number as the present matter on the first day of April, 1931, upon the application of the South Atlantic Lumber Co., who filed its petition on March 19, 1931, and since reported in 55 Fed. 2nd 232. The Record in this case shows that the final order appealed from in the present instance was entered on March 12, 1931. Hence, it is obvious that the opinion referred to first appeared of record in this cause twenty days after the final order in the present case. How such an opinion can be thought, as regards the present petitioner, to effect him either upon the theory of *res adjudicata* or *stare decisis*, and is there any other, eludes us entirely. Perhaps the quotation had no such object at all but was designed to fill a gap in the action of the District Court concerning which

the petitioner has so earnestly complained as indicated by the argument made in *ante,* p. 35. This is true because the whole theory of *stare decisis* is based upon anterior and retrospective judicial action, and if proof is required of this, it may be found in the observation of Mr. Justice White writing in

Pollock vs. Farmers Loan & Trust Co., 157 U. S. 650 (1894)

where he says, "The conservation and orderly development of our institutions rests on our acceptance of *the results of the past* and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown at any time and confusion and turmoil must ultimately result."

See too

15 C. J. 916, sec. 304.

Since, however, the South Atlantic opinion was filed twenty days after the entry of the final order herein, it is self-evident that it can not be *stare decisis* as regards this petitioner and failing of that attribute must be *wholly worthless as a justification for judicial action preceding it by twenty days.* Of course, equally preposterous would be the conception that this South Atlantic opinion could be *res adjudicata,* for it is fundamental upon that principle that there must be privity between the parties as well as chronological progressive sequence in events. Here no one will suggest that there is any privity between the South Atlantic Lumber Co. and Shapiro. They are and were separate distinct and wholly disconnected entities. Consequently, any action on the South Atlantic application so far as it bears upon Shapiro is a rimless zero. Beside this, we declare without the fear of contradiction that between the two applications there is but a single point of similarity in regard

to the theory upon which they are based. The South Atlantic opinion is exclusively based on the Pennsylvania Sales in Bulk Law; while the Shapiro application while including the Pennsylvania Sales in Bulk Law in addition thereto was based upon the Pennsylvania Uniform Fraudulent Conveyance Act, 13 Elizabeth, the Common Law, and the Seventh Amendment of the Federal Constitution, for which reason we are unable to appreciate how, with any approximation of accuracy, it can by any means be claimed that the cases of Shapiro and the South Atlantic Lumber Co. arising after it are in any respect similar. We therefore respectfully submit that so far as the South Atlantic Lumber Co. opinion is concerned, if that is meant to be referred to by the opinion of the Circuit of Appeals in this case so far as it is made to effect the opinion of the Court of Appeals, is a totally false foundation and makes necessary a reversal of the order appealed from here so far as it is based thereon.

Indeed in this connection it must be observed that the implications involved in the procedure indicated by the opinion of the Court of Appeals involves practical difficulties which will reduce the practice of law to near anarchy, for if the opinion is right in this connection, had six other creditors of Robinson subsequent to the attempt of Shapiro to challenge this fraud, on their own account made six individual attempts, and six distinct opinions been rendered thereon by as many distinct District Judges, to make the opinion of the Circuit Court in this case consistent, everything stated in the six subsequent opinions regardless of the period of time in which they should have been delivered, should be regarded by Shapiro as being justification for his anterior repulse. To merely state this proposition seriously, is to reject it.

But there yet remains in all what is said by the Circuit Court of Appeals in this connection the crowning fallacy and this is contained in the question:

6. Does the transaction disclosed upon the record violate the Pennsylvania Sales in Bulk Law?

(SPECIFICATION OF ERRORS 1, 2, 3, 4.)

It will be remembered that this question was reserved for present consideration as stated in argument *ante* p. 25. This was done because of another peculiarity present in the case abounding in peculiarities.

As this case appears reported in 55 Fed. 2nd 234, it concludes with this phrase, "McLean v. Miller Robinson Co. (D. C.), 55 Fed. (2nd) 232".

However, when the certified record printed in this case is examined (R. 25) such conclusion is wholly missing. As the Federal Reporter is a private enterprise no one concerned with this case can rightfully be charged with this extraneous addenda. It has, however, the unfortunate tendency to mislead a reader of the Federal Reporter and irresistibly makes it necessary and draws into this record by terms what theretofore existed merely by guessing and implication. Thus it becomes imperative to examine the opinion of Kirkpatrick, D. J., as reported in 55 Fed. 2nd 232, under the title of McLean v. Miller Robinson Co.

While the present petitioner in no manner was a party to proceedings in which that opinion was delivered nor concerned in its formulation, he unreservedly declares that opinion to be wholly unsound and insupportable.

The most direct and summary way to establish this is to cite and invoke the opinion in:

First National Bank v. Raleigh Savings Bank & Trust Co., 37 Fed. 2nd 301 (1930)

a case which we maintain is directly in point with the facts in the present record, for there the Circuit Court of Appeals for the Fourth Circuit held upon a transaction *in no material aspect distinguishable upon the facts from those crying out in the present instance, that the transaction violates the Sales in Bulk Law (of North Carolina in that instance, substantially identical with the Pennsylvania Statute)* and 13 Elizabeth, as well.

An examination of this last cited case unmistakably shows that it has anticipated and refuted every argument advanced by Kirkpatrick, D. J., thus in our judgment demonstrating all the errors in that opinion. In addition to what is so cogently stated by the Circuit Court of Appeals for the Fourth Circuit we submit that Kirkpatrick, D. J., errs in his opinion for these further reasons:

(a) The opinion overlooks or ignores that Robinson was co-complainant in the equity suit and that Robinson in the masquerade of the Delaware Corporation is likewise the sole defendant there, which quite independent of what has hereinbefore been argued, *ante*, p. 13, makes the whole proceedings therein described *a nullity for want of parties* because, as stated by this Court, "A man cannot sue himself."

Page v. Patton, 5 Peters 315 (1831)

for the same person cannot be plaintiff and defendant in the same suit

20 R. C. L. 663, Sec. 2

for basically,

> "A suit at law is a contest between two parties in a court of justice, the one seeking and the other withholding the thing in contest. The same individual cannot be at the same time both the party seeking and the person withholding, for it involves an absurdity

that a person should seek from himself or withhold from himself."

Monmouth Investment Co. v. Means, 151 Fed. 163-164 (1906).

Indeed, antagonistic disputants are essential to a truly judicial contest.

Pennsylvania College Cases, 13 Wall. 215 (1871).

(b) The opinion states, "There is no suggestion of actual fraud." This is clearly wrong. Legal fraud is actual and this is overwhelming present viewed from a variety of angles indepedent of the Sales in Bulk Law, *ante,* pp. 13-19.

(c) The opinion states, "The transaction did not reduce the value of the assets available to creditors but merely changed their form. Instead of the tangible property, the creditors could proceed against the stock which was indisputably of equal value." This is exceedingly naive and from the standpoint of the petitioner proves too much and if consistently adhered to, would, in the present situation, work a benefit to him. If the assets were still available to creditors, should Shapiro being one, lose his execution to reach the assets, which was denied him, but a change of form of the assets might be and generally is the most effective measure to place them beyond the reach of creditors. But the major fallacy is that stock of the Delaware Corporation is of equal value of Robinson's lumber and other tangible assets. When or where could this ever be true? In what market, stock or merchandise? When or where? And by what legal principal can the debtor select for the creditor the medium of payment against the latter's objection, in the absence of contract? We await a legal answer to these queries with some curiosity. All else in

the opinion is demolished by the argument of the Court in

First Nat. Bank v. Raleigh Savings Bank & Trust Co., supra.

For ourselves we do not overlook the presence of McLean as co-complainant with Robinson in the record of the receivership proceedings. (R. 2.) He stands alone, for all that has gone before has eliminated Robinson. The bill shows, however, that McLean is a simple contract creditor. (R. 3.) That being his status, regarding him as the sole party complainant for the moment, the lack of jurisdiction by the District Court to maintain the bill upon its face, is perfectly certain upon authority of

Pusey & Jones Co. v. Hanssen, 261 U. S. 491 (1923)

holding that a receivership in the Federal Court *is not available as a remedy for a simple contract creditor, even where the debtor is insolvent* (which this record expressly negatives) but that the creditor must exhaust his legal remedy.

It follows, therefore, that all that is said and omitted to be said by Kirkpatrick, D. J., *supra,* is erroneous with the sequel that so far as the order appealed from is founded on it, is necessarily erroneous for which reason, coupled with the manifold errors permeating all other elements in the record, make it certain that the order appealed from is wrong and should therefore be reversed.

Respectfully submitted,

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September 20, 1932.